

November 12, 2004

Lawrence H. Norton, Esq.  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Complaint against John Kobylt, Ken Chiampou, the John  
and Ken Show, KFI AM 640 and Committee to Elect  
Cynthia Matthews (Committee ID No. C00393660)  
MUR # 5569

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2004 NOV 18 AM 9:41

Dear Mr. Norton:

I am responding to the above referenced Complaint on behalf of my clients, the  
Committee to Elect Cynthia Matthews (Committee ID No. C00393660) and Cynthia Matthews.

For clarity, I wish to state that this office does not represent:

John Kobylt;  
Ken Chiampou;  
The John and Ken Show;  
KFI AM 640; or  
Kinde Durkee, Treasurer, Committee to  
Elect Cynthia Matthews.

Attached is a Letter of Memorandum and Motion to Dismiss to be filed on behalf of my  
clients: the Committee to Elect Cynthia Matthews (Committee ID No. C00393660) and Cynthia  
Matthews.

Yours very truly,

  
RICHARD SCHULENBERG

RAS/wp

Attachment: Letter of Memorandum and Motion to Dismiss

26044133398

**BEFORE THE FEDERAL ELECTION COMMITTEE**

**LETTER OF MEMORANDUM  
(11 C.F.R. §111.6)**

IN RE:

The Complaint against John Kobylt, Ken Chiampou, the John  
and Ken Show, KFI AM 640 and Committee to Elect Cynthia  
Matthews (Committee ID No. C00393660)

**MUR # 5569**

The Committee to Elect Cynthia Matthews,  
Cynthia Matthews

Respondents

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2004 NOV 18 A 9:41

**RESPONDENT THE COMMITTEE TO ELECT CYNTHIA  
MATTHEWS AND RESPONDENT CYNTHIA MATTHEWS  
RESPONSE AND MOTION TO DISMISS**

The following Letter of Memorandum in Response to the Complaint filed by the National  
Republican Congressional Committee (hereinafter referred to as the "NRCC") is being filed on  
behalf of the Committee to Elect Cynthia Matthews (hereinafter referred to as the "CECM") and  
Cynthia Matthews (hereinafter referred to as "Matthews").

Please note this office does not represent:

John Kobylt;

Ken Chiampou;

The John and Ken Show;

KFI AM 640; or

Kinde Durkee, Treasurer, Committee to

Elect Cynthia Matthews.

Respondents the Committee to Elect Cynthia Matthews and Cynthia Matthews hereby  
Responds and Moves the Federal Election Committee to dismiss MUR #5569.

**BACKGROUND**

On October 14, 2004, the NRCC filed a Complaint with the Federal Election Commission  
based upon a radio campaign entitled "Political Human Sacrifice" run by two radio talk show  
hosts on radio station KFI AM 640 (hereinafter referred to as "KFI") in Los Angeles, California.

The two hosts. John Kobylt ("Kobylt") and Ken Chiampou ("Chiampou") have a weekday daily radio show called the "Ken and John Show" (hereinafter referred to as the "Show").

In July, 2004, Kobylt and Chiampou started their "Political Human Sacrifice" campaign by presenting their listeners with a list of political incumbents who would be running for re-election. The incumbents who were included in the list were wrong, in the view of Kobylt and Chiampou, on the issue of illegal immigration. After voting by listeners, including a runoff vote, Congressman David Dreier ("Dreier") of California's 26<sup>th</sup> District won the honor of being the Show's Republican "Political Human Sacrifice." Note that a Democratic "Political Human Sacrifice", Congressman James Bacca, was also chosen. The NRCC, apparently, has no issue with Kobylt and Chiampou conducting a political diatribe against a Democratic Congressman.

After beginning the "Political Human Sacrifice" campaign based upon the issue of illegal immigration, Kobylt and Chiampou invited Dreier and his opponent, Matthews, to be interviewed for the Show. Dreier declined. Matthews accepted. Up to election eve, November 1, 2004, Kobylt and Chiampou begged and exhorted Dreier to appear on the Show, either in person or on the telephone. In every instance, Dreier declined.

The NRCC's "Factual Background" chronicles carefully selected tidbits from the Show omitting all public issue references from its examples. This is a misrepresentation of the purpose of the "Political Human Sacrifice" campaign which was to target the public issue of illegal immigration. While the NRCC would have the Commission believe the purpose of the "Human Political Sacrifice" campaign was to elect Matthews, the general public's impression was far more correct in identifying the public issue nature of the Show:

So yes John and Ken had a measurable effect on the election, and did us a favor by discussing the taboo topic of illegal immigration, which politicians won't touch.<sup>1</sup>

#### **ARGUMENT**

1. **No Facts Are Stated or Allegations Made Linking the CECM to the Allegations Contained in the Complaint Filed by the NRCC.**

It is a curious fact that the CECM is mentioned only three times in the NRCC's Complaint. First, in the "Regarding" header of the Complaint at the top of page 1. Second, in the

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<sup>1</sup> "Letters to the Times," Los Angeles Times, Opinion, page B12, Thursday, November 11, 2004.

introductory paragraph of the Complaint, also at the top of page 1. The third, and final reference to the CECM is in the last paragraph of the Complaint, the "Conclusion", just before Mr. McGahn's "Respectfully submitted," at the top of [unnumbered] page 7.

A cursory reading, then a careful reading, and, finally, a fine-tooth comb reading of the Complaint between the first two mentions and the final mention at the end of the Complaint, failed to find any reference, allegation, claim or even altered version of any alleged quote (see below) referencing the CECM which would link it to any allegation made in the Complaint.

Apparently, the NRCC believes the mere mention of the CECM's name by the NRCC is sufficient grounds to qualify the CECM "for criminal prosecution".<sup>2</sup> Counsel for the NRCC places the burden on Respondent's counsel and the Federal Election Commission to connect the dots for him to find the CECM guilty of unlawful acts. Unfortunately for the NRCC, the Complaint provides no dots to connect. Counsel for the NRCC has failed even to provide any allegations that CECM was in any way connected to the activities alleged in the Complaint.

Contrary to the assertions of the NRCC, there is no evidence that CECM directed and received illegal corporate contributions. No allegations have been lodged against CECM in the Complaint. Because Counsel for the NRCC has failed to link the CECM to any allegations contained in the Complaint, the NRCC's assertions are completely without merit and MUR #5569 should be promptly dismissed against the CECM.

## **2. Matthews Is Not Named in the Complaint.**

"Curiouser and curiouser."<sup>3</sup> Matthews, a candidate opposing Congressman Dreier in the election, is quoted and misquoted in the Complaint, presumably for evidentiary purposes, but not named in the Complaint. Allegations are made against Matthews, but Counsel for the NRCC has, apparently, willfully<sup>4</sup> chosen not to name Matthews in the Complaint. In the header, introductory paragraph and prayer of the Complaint, Matthews is conspicuous in her absence. Whatever the purpose for leaving Matthews off the list of parties being charged, the fact remains that Matthews

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<sup>2</sup> Final sentence, Section III, Conclusion, unnumbered p.7 of the Complaint.

<sup>3</sup> *Alice in Wonderland*, Lewis Carrol

<sup>4</sup> To presume otherwise would imply unthinkable incompetence on the part of Counsel for the NRCC.

is not a named party and any accusations of any conduct on her part is beyond the scope of the Complaint and without merit.

Notwithstanding the fact that Matthews is not named in the Complaint, it is important to respond to the carefully chosen examples of statements purportedly made by Matthews on the Show. In the multitude of radio broadcasts monitored by the NRCC (see footnotes on [unnumbered] page 2 of the Complaint), the NRCC can find only two statements, one of which is incorrect as stated (see below). Surely, if Matthews and/or the CECM were in collusion with Kobylt and Chiampou the NRCC must certainly have found better examples than the two given to illustrate any contention of illegal activity. Since the NRCC has used these examples, we must assume that they are the "Best in Show".

The first example:

During a September 7, 2004, radio show, John and Ken state: "You must be excited David Dreier was the choice?" Cynthia Matthews, who is Congressman Dreier's opponent, responded: "Very excited. **There is no other way to go up against an incumbent without other support** [sic - emphasis added in the Complaint].<sup>5</sup>

The Complaint appears to rely on this statement and the statement below, that Matthews has knowingly solicited illegal corporate contributions from "the Ken and John Show". To be invited to do an interview on a radio talk show devoted to the discussion of public issues and then, in answer to a question, to make a statement about the problems in competing against an incumbent cannot be logically interpreted as a solicitation for a corporate contribution.

Absent collaborating facts to the contrary, there is no way that this factual response to a question on a public affairs talk show can support any allegation of a violation of 2 U.S.C. § 441i(e)(1)(A) without plumbing the absolute depths of absurdity. (There is, of course, also the allegation of a violation of 11 C.F.R. § 300.62 – a provision which deals only with "non-Federal election(s)". Unless Matthews in moonlighting and running in another election, a violation of this provision by either Matthews or CECM would be a physical impossibility. A modest proposal: strike this allegation from the Complaint.<sup>6</sup> )

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<sup>5</sup> Unnumbered page 3 of the Complaint.

<sup>6</sup> And revisit Footnote 4.

No doubt learned Counsel for the NRCC would state: "Aha! But look at the second statement!"

Let us look at the second example:

Congressman Dreier's opponent, Cynthia Matthews admits that she would not be able to compete without the corporate sponsorship of the Ken and John Show. In response to John and Ken's questions she responded with a rhetorical question: "**How do I compete with five to ten thousand in the Bank [without the support of this Show [sic - emphasis added in the Complaint]]?**"<sup>7</sup>

What a piece of work is this "factual" statement. Counsel for the NRCC states, as a "fact" that "... Matthews *admits* that she would not be able to compete ... without the corporate sponsorship of the Ken and John Show."<sup>8</sup> [Emphasis added.] Once more, a careful search of the Complaint comes up empty. Where is the smoking gun? Where is the solicitation – the "Boys, gimme free time on your Show"?

The "admission" stated as a fact in the Complaint is the statement: "How do I compete with five to ten thousand in the bank?" That is the true statement after stripping off the Complaint's gratuitous and convenient interpretation: "[without the support of this Show]" added by Counsel for the NRCC to an innocent answer to a question posed. Without the fabricated addition this statement there is no admission, factual or otherwise, as stated in the Complaint.

Even if Matthews was named in the Complaint, which, of course, she isn't, the failure of the "facts" as they are supplied by the NRCC, would be sufficient to successfully dismiss MUR #5569.

#### LEGAL ANALYSIS

It is Respondents' positions that procedurally MUR #5569 should be dismissed against both CECM and Matthews on the grounds that:

- (1) While CRCM is named in the Complaint, not one factual allegation has been made against CECM; and

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<sup>7</sup> Unnumbered page 4 of the Complaint.

<sup>8</sup> *Op cit.*

- (2) While Matthews has tenuous and spurious factual allegations made against her, Matthews is not named in the Complaint.

Notwithstanding the procedural failings of the NRCC's Complaint, there are other legal issues which must be addressed.

**I. Express Advocacy Standard and the First Admendment**

Counsel for the Respondents herein is not in a position to argue the legal issues on behalf of Kobylt, Chiampou, the Show; KFI, or Kinde Durkee, and takes no position on their behalf, but there are certain legal issues which deserve comment.

From the beginning of the "Political Human Sacrifice" campaign Kobylt, Chiampou and their Show advocated stronger legislation to protect the United States' borders from illegal immigrants, especially those from Mexico. The potential sacrifices were all elected officials whose legislative history, according the Kobylt and Chiampou, showed them to be weak on the issue of illegal migration. The Complaint neglects to mention the fact that the "Political Human Sacrifice" campaign was advocating a public issue position.

The NRCC maintains that KFI has removed itself from the protection of the First Amendment because of alleged express advocacy.<sup>9</sup>

The Complaint attempts to treat any funds spent on the Show by KFI, presumably electricity, overhead, etc., as an expenditure on behalf of Matthews' candidacy under 2 U.S.C. §441a(d) and subject to the reporting requirements of the Act. This position flies in the face of the Express Advocacy Standard adopted by the courts and the Federal Election Commission. Long before interviewing Matthews on the air, the Show's "Political Human Sacrifice" campaign was already advocating stronger immigration laws and taking to task politicians of either party that Kobylt and Chiampou felt were weak on this issue. The Complaint ignores the non-partisan nature of the "Political Human Sacrifice" campaign. Congressman James Bacca, a Democrat, was also attacked with equal fury and rigor for his legislative record on immigration.

It should be noted that Matthews, when interviewed by Kobylt and Chiampou on the Show, was never asked any question about her positions, personally or as a candidate, on any issue other than illegal immigration.

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<sup>9</sup> Unnumbered page 4 of the Complaint.

The courts have recognized the sanctity of free communication on public issues and the protection, the broadest possible protection, of communication on public issues under the First Amendment. In *New York Times v. Sullivan*, 376 U.S. 254 (1964) at page 270, the Court stated that the First Amendment is a "profound national commitment to the principle that debate on public issues should be *uninhibited, robust, and wide open*." [Emphasis added.]

The courts have long recognized that the free communication on public issues, including the qualifications of candidates, deserves the broadest possible protection under the First Amendment. See *FEC v. Christian Action Network*, 894 F.Supp. 946 (W.D. Va. 1995); *Maine Right to Life Comm. v. FEC*, 914 F.Supp. 8 (D. Me. 1196); and *FEC v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that the First Amendment limits the power of the federal government to regulate contributions and expenditures for political purposes and that communication on public matters must be given the broadest protection under the First Amendment. In protecting public debate of public issues, the Supreme Court has held that discussion of a candidate's position on a particular issue are not subject to the Federal Election Campaign Act of 1971, see *Buckley*, op cit., at page 42. Also on page 42, the Supreme Court states:

The distinction between discussion of issues and candidates and advocacy of election and defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

This blurred demarcation between the free discussion of public issues and advocacy of candidates and the inevitable affect the discussion may have on an election requires that any application of any standard to determine express advocacy when public issues are the subject matter *must* be severely restricted and scrutinized. The protection of the First Amendment in these types of cases require courts to "apply the most exacting scrutiny to regulations that suppress, disadvantage, or



impose differential burdens upon speech because of its content.”<sup>10</sup> That “exacting scrutiny “ of the circumstances which might allow the government to place restrictions (such as are being requested in the NRCC’s Complaint) on political speech requires the government to show that the restriction will serve a “compelling government interest.” Without a “compelling government interest,” any such restriction would be unconstitutional, see *Buckley*, op cit., at pages 22-25. The bar has been set high for any justification of any governmental restraint of free speech in elections as it is a “firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution.” *FEC v. Central Long Island Tax Reform*, 616 F.2nd. 45 (1980), at page 53.

In *Maine Right to Life*, op cit., at page 12, the District Court states:

FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but by all costs avoids restricting in any way, discussion of public issues.

Wherever the Commission may place Kobylt, Chiampou, the Show and KFI in relationship to that “bright line”, there can be no question that Matthews, who was never more than an invited guest, and the CECM are well on the side of the bright line wherein lies the protection of the First Admendment.

## **II. Direction, Receipt and Coordination of Illegal Corporate Contributions.**

The NRCC’s Complaint alleges “illegal corporate coordination” between the Show and KFI and... who? A literal reading of the Complaint would appear that the NRCC’s concerns about illegal corporate coordination are only with the relationship between the Show and KFI.<sup>11</sup>

Notwithstanding the Complaint’s failure to make allegations against Respondents CECM and Matthews in section II.D. of the Complaint, there are scattered and passing unsupported allegations elsewhere in the Complaint which should be subject to comment.

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<sup>10</sup> *Turner Broadcasting Sys Inc. v. FEC*, 512 U.S. 622 (1994). See also, *Fulani v Krivanek*, 973 F.2nd 1539 (11<sup>th</sup> Cir. 1992).

<sup>11</sup> See “D. Illegal Corporate Coordination”, unnumbered page 6 of the Complaint.

For example, section II. A. of the Complaint is entitled: "Cynthia Matthews Directed and Received Illegal Corporate Contributions".<sup>12</sup> A serious accusation, especially coupled with claims that Matthews' actions qualify as felonies, illegal criminal behavior and should be "prosecuted to the fullest extent of the law",<sup>13</sup> claiming that the "facts" presented in the Complaint "clearly have demonstrated that Matthews and her campaign have illegally received corporate contributions."<sup>14</sup> As discussed above, there are no facts or legal interpretation that will support allegations that Matthews or CECM received any contributions, illegal or otherwise, from the Show or KFI. The facts alleged in the Complaint do not "clearly demonstrate" the allegations made.

Other than the heading of section II.A., there is no "fact" alleged anywhere in the Complaint that Matthews "directed" the Show, KFI, Kobylt, or Chiampou to provide funds, actual or in-kind, for her campaign.

On the question of coordination, the accusation that Matthews directed the other parties to make illegal corporate contributions does not meet the standards required by the courts. In *FEC v. The Christian Coalition*, 52 F.Supp.2d 45 (D.D.C. 1999) along with rejecting the assertion that "express advocacy" was required for coordination expenditures to be considered as contributions (at pages 87 - 88), the Court addressed the question of how coordination could occur. The Court set forth two general tests to be considered.

The first deals with a "request" or "suggestion" from the candidate or the candidate's agent finding that "expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent" would be considered to be coordination (at page 91). What "request" or "suggestion" is alleged by the NRCC? The allegation is that: "... Cynthia Matthews has appeared on the show numerous times and has had material involvement and substantial discussions with the John and Ken Show and KFI AM 640 regarding the public communications."<sup>15</sup> If that is the allegation supporting the presence of a "request" or "suggestion" on the part of Matthews to Kobylt, Chiampou, the Show and/or KFI, the temptation exists to

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<sup>12</sup> See unnumbered page 4 of the Complaint.

<sup>13</sup> See unnumbered page 6 of the Complaint.

<sup>14</sup> See unnumbered page 5 of the Complaint.

<sup>15</sup> See unnumbered page 6 of the Complaint.

respond with: "Huh?" The leap from the allegation to the accusation is too wide for logic to span. Once more Counsel for the NRCC is asking Respondents and the Commission to fill in the missing dots on his behalf to prove his case. Once more the dots are missing because they do not exist.

The second test applies where no "request" or "suggestion" can be found, which is certainly true in the instant case. The Court held that in the absence of a request or suggestion, "an expressive expenditure becomes 'coordinated,' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g. choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots)." *Christian Coalition* at page 92.

There is no allegation in the Complaint that Matthews or CECM had any exercise of control over Koblyt, Chiampou, the Show or KFI. Indeed, by the Complaint's own admission, KFI and the Show "has one of the highest advertising rates in the country"<sup>16</sup> and Matthew's campaign was underfunded, quoting Matthews as saying, "How do I compete with five to ten thousand dollars in the Bank?"<sup>17</sup> How can a grossly underfunded candidate exercise control over one of the most financial successful radio stations in the country? The answer is, the candidate can't.

The alternative to exercise of control under this test is "where there has been substantial discussion or negotiation between the campaign and the spender" over the elements of a communication, as set forth at page 92 of *Christian Coalition*. The Complaint acknowledges the need for the discussions to be "substantial" by using the term in the allegation, but it is highly unlikely that on-air radio interviews, broadcast to the public, are the type of "substantial discussion" that the Court in *Christian Coalition* referred to or, for that matter, that any court would use to decide that the discussion would constitute "coordination." Also, in another case decided shortly after *Christian Coalition*, *FEC v. Public Citizen, Inc.*, 64 F.Supp2d 1327 (N.D.Ga. 1999) the Court held that multiple communications between the independent spender and the

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<sup>16</sup> See unnumbered page 2 of the Complaint.

<sup>17</sup> See unnumbered page 3 of the Complaint.

candidate did not rise to the level of consultation or coordination between the parties. Surely, on-air, live broadcasts interviews would be judged in the same manner.

The discussions in question, on-air public broadcasts based on the free discussion of public issues are subject to highest form of protection afforded under the First Amendment. To curtail, restrict or, as demanded in the Complaint, to punish these discussions is to fly against the very purpose of the First Amendment.

### CONCLUSION

There is irony in the Complaint filed by the NRCC – all this effort to stop the “Political Human Sacrifice” of their candidate when the affect of the proffered sacrifice on their candidate was *de minimis*. Congressman Dreier won the election 57% to 43%. As they say in sports: “No harm, no foul.” The Complaint filed by the NRCC against Respondents CECM and Matthews is flawed factually, procedurally and legally. The timing of and the sketchy content of the Complaint indicate its purpose: to intimidate the opponent of one of the NRCC’s anointed candidates in the final days before an election. That the NRCC would object to the uninhibited, robust, and wide open debate in this instance while embracing it when the focus of the debate is its “public issue” – for example, the same Congressman Dreier appeared on the same Show and on the same KFI and supported equally strident language against then California Governor Gray Davis insisting that he be recalled from office and replaced by Republican Arnold Schwarzenegger – is a profoundly disturbing travesty of the protection afforded by the First Amendment.

For all the foregoing reasons, MUR # 5569 should be dismissed against Respondents the Committee to Elect Cynthia Matthews and Cynthia Matthews.

Respectfully submitted,

RICHARD A. SCHULENBERG,  
A PROFESSIONAL CORPORATION

By 

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